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10 *and Navient Credit Finance Corporation*

11 **UNITED STATES BANKRUPTCY COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 **IN RE: OSCAR D. TERAN, Debtor**

Bankruptcy No. 10-31718
Chapter 7

16
17 **OSCAR D. TERAN, on behalf of himself**
and all those similarly situated,

Adversary No. 20-03075

18 **Plaintiffs,**

19
20 **v.**

21 **NAVIENT SOLUTIONS, LLC, NAVIENT**
CREDIT FINANCE CORPORATION,

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
COUNT THREE OF PLAINTIFF'S
COMPLAINT OR, ALTERNATIVELY,
COMPEL ARBITRATION**

22 **Defendants.**

23 Date: February 26, 2021
24 Time: 9:00 a.m.
25 Location: Telephonic Appearance
Courtroom 17
150 Golden Gate Avenue
16th Floor
San Francisco, CA 94102

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	7
II. FACTUAL BACKGROUND	9
A. Commencement of this Adversary Proceeding.	9
B. The Arbitration Agreement in the Promissory Note.	9
III. ARGUMENT	11
A. Standard of Review.	11
B. The Court Lacks Subject Matter Jurisdiction Over the CCCRAA Claim.....	11
C. The Plain Language of the Promissory Note and the FAA Mandate Arbitration for the CCCRAA Claim.	14
D. Even If Subject Matter Jurisdiction Existed, the Bankruptcy Court Should Enforce the Arbitration Agreement With Respect to Plaintiff’s Claim Under the CCCRAA.....	17
E. Arbitration of Plaintiff’s CCCRAA Claim Does Not Conflict With Fundamental Bankruptcy Policy	19
IV. CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>Allen v. Equifax Info. Servs., LLC</i> , No. 3:17-CV-211-DJH-CHL, 2017 WL 5762414, at *4–5 (W.D. Ky. Nov. 28, 2017).....	21
<i>ASUS Computer Int’l v. InterDigital, Inc.</i> , No. 15-CV-01716-BLF, 2015 WL 5186462 (N.D. Cal. Sept. 4, 2015).....	12
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011)	16
<i>AT&T Techs., Inc. v. Commc’ns Workers of Am.</i> , 475 U.S. 643 (1986)	16
<i>In re Atwood</i> , 452 B.R. 249 (Bankr. D.N.M. 2011).....	19
<i>Belton v. GE Capital Consumer Lending, Inc. (In re Belton)</i> , No. 15-cv-1934, 2015 WL 6163083 (S.D.N.Y. Oct. 14, 2015)	17
<i>Bensadoun v. Jobe–Riat</i> , 316 F.3d 171 (2nd Cir. 2003).....	12
<i>Buckingham v. Baptist Memorial Hosp.</i> , 283 B.R. 691 (N.D. Miss. 2002)	15
<i>In re Close</i> , 2003 WL 22697825 (Bankr. E.D. Pa. 2003).....	15
<i>Co., Inc. v. Gen. Tel. & Elecs. Corp.</i> , 594 F.2d 730 (9th Cir. 1979).....	12
<i>CompuCredit Corp. v. Greenwood</i> , 565 U.S. 95, 98 (2012).....	16
<i>Countrywide Home Loans, Inc. v. Mortgage Guar. Ins. Corp.</i> , 642 F.3d 849 (9th Cir. 2011).....	17
<i>In re Csondor</i> , 309 B.R. 124 (Bankr. E.D. Pa. 2004).....	14, 19
<i>Dean Witter Reynolds Inc. v. Byrd</i> , 470 U.S. 213 (1985)	17

1	<i>Duke v. Trans Union LLC,</i>	
2	No. CIV. 08-520-KI, 2008 WL 4319982 (D. Or. Sept. 16, 2008)	19
3	<i>In re Eber,</i>	
4	687 F.3d 1123 (9th Cir. 2012).....	18
5	<i>In re EPD Inv. Co.,</i>	
6	LLC, 821 F.3d 1146 (9th Cir. 2016)	18
7	<i>In re Fietz,</i>	
8	852 F.2d 455 (9th Cir. 1988).....	13
9	<i>First Options of Chi., Inc. v. Kaplan,</i>	
10	514 U.S. 938 (1995)	16
11	<i>Gadomski v. Wells Fargo Bank N.A.,</i>	
12	281 F. Supp. 3d 1015 (E.D. Cal. 2018).....	20
13	<i>Gilmer v. Interstate/Johnson Lane Corp.,</i>	
14	500 U.S. 20 (1991)	16
15	<i>In re Goldstein,</i>	
16	201 B.R. 1 (Bankr. D. Me. 1996).....	15
17	<i>GT Sec., Inc. v. Klastech GmbH, Case</i>	
18	No. 13-cv-3090-JCS, 2014 WL 2928013 (N.D. Cal. June 27, 2014)	12
19	<i>In re Humes,</i>	
20	496 B.R. 557 (Bankr. E.D. Ark. 2013).....	19
21	<i>In re Hye Rhee Kong,</i>	
22	No. 08-50127-SLJ, 2013 WL 6923063 (Bankr. N.D. Cal. Nov. 15, 2013)	14
23	<i>Ivax Corp. v. B. Braun of Am., Inc.,</i>	
24	286 F.3d 1309 (11th Cir. 2002).....	17
25	<i>Jenkins v. Fifth Third Bank,</i>	
26	No. 1:16-cv-976, 2017 WL 3605357 (S.D. Ohio Aug. 22, 2017).....	21
27	<i>Kaneff v. Delaware Title Loans, Inc.,</i>	
28	587 F.3d 616 (3rd Cir. 2009).....	12
	<i>Kasim v. Equifax Info. Servs., LLC,</i>	
	No. CIV.08-627-HA, 2008 WL 4858267 (D. Or. Nov. 10, 2008).....	14
	<i>Kasim v. Equifax Info. Servs., LLC,</i>	
	No. CIV. 08-628-HA, 2008 WL 4793685 (D. Or. Oct. 28, 2008).....	19
	<i>Kokkonen v. Guardian Life Ins. Co.,</i>	
	511 U.S. 375 (1994)	12

1	<i>In re Lee Sinn,</i>	
2	No. 10-43746-CAN13, 2014 WL 7689811 (Bankr. W.D. Mo. Oct. 7, 2014)	19
3	<i>Maitland v. Mitchell (In re Harris Pine Mills),</i>	
4	44 F.3d 1431 (9th Cir.1995).....	13
5	<i>Mann v. Equifax Info. Servs., LLC,</i>	
6	No. 12-CV-14097, 2013 WL 3814257 (E.D. Mich. July 22, 2013)	20, 21
7	<i>McGlynn v. Credit Store, Inc.,</i>	
8	234 B.R. 576 (D. R.I. 1999).....	15
9	<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.,</i>	
10	460 U.S. 1 (1983)	16
11	<i>NL Indus. v. Kaplan,</i>	
12	792 F.2d 896 (9th Cir.1986).....	12
13	<i>In re Nordeen,</i>	
14	489 B.R. 203 (D. Nev. 2013)	19
15	<i>In re Pegasus Gold Corp.,</i>	
16	394 F.3d 1189 (9th Cir. 2005).....	13
17	<i>In re Perkins,</i>	
18	533 B.R. 242 (Bankr. W.D. Mich. 2015).....	19
19	<i>Perry v. NorthCentral Univ., Inc.,</i>	
20	No. CV-10-8229-PCT-PGR, 2011 WL 4356499 (D. Ariz. Sept. 19, 2011).....	12
21	<i>Prima Point Corp. v. Flood & Conklin Mfg. Co.,</i>	
22	388 U.S. 395 (1967)	17
23	<i>Rent-A-Center, West, Inc. v. Jackson,</i>	
24	561 U.S. 63 (2010)	16, 17
25	<i>In re Resorts Intern., Inc.,</i>	
26	372 F.3d 154 (3rd Cir. 2004).....	12
27	<i>In re Reyes,</i>	
28	238 B.R. 507 (Bankr. D. R.I. 1999)	15
	<i>Schultze v. Chandler,</i>	
	765 F.3d 945 (9th Cir. 2014).....	13
	<i>Shields v. Frontier Tech., LLC,</i>	
	No. CV 11-1159-PHX-SRB, 2011 WL 13070409 (D. Ariz. Nov. 30, 2011)	12
	<i>In re Steele,</i>	
	258 B.R. 319 (Bankr. D. N.H. 2001)	15

1	<i>In re Thorpe Insulation Co.,</i>	
2	671 F.3d 1011 (9th Cir. 2012).....	18, 20
3	<i>In re Valdez Fisheries Dev. Ass’n, Inc.,</i>	
4	439 F.3d 545 (9th Cir. 2006). Bankruptcy	12
5	<i>In re Vogt,</i>	
6	257 B.R. 65 (Bankr. D. Colo. 2000)	15
7	Federal Statutes	
8	9 U.S.C. § 2	15, 16, 17
9	9 U.S.C. § 3	8, 9, 16, 17
10	9 U.S.C. § 4	8, 9, 16
11	11 U.S.C. § 7	8, 9, 19, 20, 21
12	15 U.S.C. § 1681	14, 19, 20, 21
13	15 U.S.C § 1692	14, 15, 19
14	28 U.S.C. § 157	12, 13, 20
15	28 U.S.C. § 157(a).....	13
16	28 U.S.C. § 157(b)(2).....	13, 19
17	28 U.S.C. § 1334	12
18	28 U.S.C. § 1334(b)	13
19	State Statutes	
20	Cal. Civ. Code § 1785.25	8
21	Cal. Civ. Code § 1785.31	8
22	Rules	
23	Fed. R. Civ. P. 12(b)(1).....	8, 9, 12
24	Fed. R. Bankr. P. 7012	8, 12
25		
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (the “Rules”), as made
3 applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the
4 “Bankruptcy Rules”), and Sections 3 and 4 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 3
5 and 4, Defendants Navient Solutions, LLC and Navient Credit Finance Corporation
6 (collectively, “Navient”), through this motion (the “Motion”), respectfully request that this Court:
7 (a) dismiss Count Three of the Class Action Complaint (the “CCCRAA Claim”) filed by Plaintiff
8 Oscar D. Teran for lack of subject matter jurisdiction or, in the alternative, (b) compel Plaintiff to
9 submit the CCCRAA Claim to binding arbitration. To the extent necessary, this Motion constitutes
10 Navient’s written notice of an election to arbitrate all of the claims in the Complaint.

11 **I. INTRODUCTION**

12 As a student, Plaintiff applied for and obtained a bar study educational loan that is serviced
13 by Navient. Plaintiff thereafter sought relief under Chapter 7 of Title 11 of the United States Code
14 (the “Bankruptcy Code”) in this Court. Plaintiff now asserts in this Adversary Proceeding that his
15 bar study educational loan is not excepted from discharge¹ and seeks (a) relief from purported
16 violations of this Court’s discharge order, (b) a determination of dischargeability for such loan and
17 (c) a separate cause of action relating to the credit reporting of such loan under the California
18 Consumer Credit Reporting Agencies Act (“CCCRAA”), California Civil Code Sections 1785.25
19 and 1785.31, on behalf of himself and on behalf of a purported class of persons.

20 The Court lacks subject matter jurisdiction over the CCCRAA Claim. The CCCRAA Claim
21 does not arise in or under Title 11. Nor is the claim related to Plaintiff’s bankruptcy case –
22 resolution of the CCCRAA claim will not affect administration of the estate in any way and does
23 not affect any confirmed bankruptcy plan or related litigation trust. It is a purely post-discharge

24 _____
25 ¹ Navient disputes, among other things, Plaintiff’s assertions regarding the
26 dischargeability of his student loan because they are contrary to the plain language of Section
27 523(a)(8), which provides an exception to discharge for student loans such as this, and other
28 authority on the dischargeability of student loans. Navient expressly reserves any and all of its
rights, claims, and defenses in regard to the claims asserted in the Complaint.

1 dispute between Plaintiff and Navient. This Court and numerous courts across the country have
2 found subject matter jurisdiction to be lacking in such circumstances.

3 Moreover, even if subject matter jurisdiction existed, the CCCRAA claim would be subject
4 to mandatory arbitration. When Plaintiff obtained his bar study loan, he entered into a valid and
5 binding agreement (a promissory note) that contained an arbitration agreement (the “Promissory
6 Note”². The arbitration agreement requires arbitration of any legal claim, dispute or controversy,
7 including disputes involving alleged violations of statute, regulation, or common law, and claims
8 for equitable or declaratory relief. The dispute over whether Navient’s conduct violated the
9 provisions of the CCCRAA is plainly within the scope of this arbitration agreement.

10 A long line of Supreme Court precedent upholds the expansive reach of the FAA across a
11 wide-spectrum of statutory schemes. This reach extends to the Ninth Circuit, where a bankruptcy
12 court must enforce a valid arbitration agreement in “non-core” matters. Non-core matters are those
13 that do not arise from the Bankruptcy Code or the bankruptcy proceeding itself, but are merely
14 “related to” a bankruptcy case. To the extent the Court has jurisdiction at all, Plaintiff’s CCCRAA
15 cause of action is a non-core claim, and is therefore subject to binding arbitration.

16 Moreover, arbitration of Plaintiff’s CCCRAA Claim does not prevent Plaintiff from
17 effectively vindicating his statutory rights under the Bankruptcy Code and does not inherently
18 conflict with the purposes of the Bankruptcy Code. Therefore, the arbitration agreement in the
19 Promissory Note must be enforced.

20 Accordingly, pursuant to Rule 12(b)(1) and 9 U.S.C. §§ 3–4, Navient respectfully requests
21 that this Court (a) dismiss the CCCRAA Claim for lack of subject matter jurisdiction or, in the
22 alternative, to (b) compel arbitration of the CCCRAA claim.

23 ///

24 ///

26
27 ² A true and correct copy of the Promissory Note is attached as Exhibit 1 to the Declaration
28 of Joseph Florczak in Support of Defendants’ Motion to Dismiss Count Three of Plaintiff’s Complaint or,
Alternatively, Compel Arbitration filed contemporaneously herewith.

1 **II. FACTUAL BACKGROUND**

2 **A. Commencement of this Adversary Proceeding**

3 In May 2010, Plaintiff filed for Chapter 7 bankruptcy protection, and received a discharge
4 on August 17, 2010. *See* Case No. 10-31718, Dkt. No. 11. On August 31, 2020, ten years after his
5 discharge and the closing of the Bankruptcy Case, Plaintiff filed this adversary proceeding seeking
6 (i) a declaratory judgment that Navient violated the discharge orders of the Court with respect to
7 Plaintiff and purported class members; (ii) a determination of dischargeability as to Plaintiff's and
8 purported class members' loans; and (iii) relief under the CCCRAA for Plaintiff and a purported
9 subclass. *See* Dkt. No 1 (the "Complaint") ¶¶ 73-97.

10 **B. The Arbitration Agreement in the Promissory Note**

11 The Promissory Note contains a valid and binding arbitration agreement. (Ex. 1). The
12 arbitration provision generally provides that any past, present, or future legal dispute or any claim
13 of any kind, including statutory and common law claims, and claims for equitable relief, that relate
14 in any way to the Promissory Note, will be resolved by binding arbitration. The relevant portions
15 of the applicable provisions are as follows:

16 To the extent permitted under federal law, you and I agree that either party may elect to
17 arbitrate - and require the other party to arbitrate - any Claim under the following terms
18 and conditions. This Arbitration Agreement is part of the LAWLOANS Bar Study Loan
19 Note ("Note"). . . .

20 **2. IMPORTANT WAIVERS: If you or I elect to arbitrate a Claim, you and I both**
21 **waive the right to: (1) have a court or a jury decide the Claim; (2) PARTICIPATE**
22 **IN A CLASS ACTION IN COURT OR IN ARBITRATION, WHETHER AS A**
23 **CLASS REPRESENTATIVE, CLASS MEMBER OR OTHERWISE; OR ACT**
24 **AS A PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION**
25 **(the "CLASS ACTION WAIVER"); (3) join or consolidate Claim(s) with claims**
26 **involving any other person; or (4) obtain information except as provide herein.**

27 **3. DEFINITIONS:** In this Arbitration Agreement, the following definitions will
28 apply:

1 “I,” “me” and “my” mean each and every Borrower and Cosigner on the Note; the
2 Student on whose behalf the proceeds of the Note have been advanced; and the heirs,
3 executors and assigns of all of the foregoing. “You,” “your” and “yours” mean the
4 Lender; any other subsequent holder of this note; Sallie Mae; SLM Financial
5 Corporation; all of their parents, wholly or majority owned subsidiaries and affiliates;
6 any predecessors, successors and assigns of these entities. . . . It also includes any
7 party named as a co-defendant with you in a Claim asserted by me, such as investors or
8 potential investors, credit bureaus, credit insurance companies, closing agents, escrow
9 agents, insurance agents, loan originators, rating agencies, loan servicers, debt
10 collectors, loan guarantors, performance bond trustees, tuition recovery funds, the
11 School, and any of the School’s financial aid offices or officers. . . .

12 4. “CLAIM” means any legal claim, dispute or controversy between you and me that
13 arises from or relates in any way to the Note, including any dispute arising before the
14 date of this Arbitration Agreement and any dispute relating to: (1) fees, charges or other
15 provisions of the Note; (2) any application, disclosure or other document relating in any
16 way to the Note or the transactions evidenced by the Note. . . . This includes, without
17 limitation, disputes concerning the validity, enforceability, arbitrability or scope of this
18 Arbitration Agreement or the Note; disputes involving alleged fraud or
19 misrepresentation, breach of contract, negligence or violation of statute, regulation or
20 common law; and disputes involving requests for injunctions or other equitable relief.
21 However, “Claim” does not include any individual action brought by me in small claims
22 or my state’s equivalent court, unless such action is transferred, removed, or appealed
23 to a different court. **Also “Claim” does not include any challenge to the validity and
24 effect of the Class Action Waiver, which must be decided by a court.**

25 (Ex. 1 at § S (emphasis in original)).

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1 **III. ARGUMENT**

2 **A. Standard of Review**

3 Rule 12(b)(1), as incorporated by Bankruptcy Rule 7012, allows a party to challenge a
4 federal court's jurisdiction over the subject matter of the complaint. *See* Fed. R. Civ. Pro. 12(b)(1).
5 The party invoking the jurisdiction of the federal court bears the burden of establishing that the
6 court has the requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v.*
7 *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A complaint will be dismissed if, looking at the
8 complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually."
9 *See Thornhill Pub. 'g Co., Inc. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).
10 When the complaint is challenged for lack of subject matter jurisdiction on its face, all material
11 allegations in the complaint will be taken as true and construed in the light most favorable to the
12 plaintiff. *See NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

13 Likewise, courts generally treat motions to compel arbitration as motions to dismiss for lack
14 of subject matter jurisdiction pursuant to Rule 12(b)(1). *See, e.g., ASUS Computer Int'l v.*
15 *InterDigital, Inc.*, No. 15-CV-01716-BLF, 2015 WL 5186462, at *2 (N.D. Cal. Sept. 4, 2015)
16 (citing *GT Sec., Inc. v. Klastech GmbH*, Case No. 13-cv-3090-JCS, 2014 WL 2928013, at *17
17 (N.D. Cal. June 27, 2014)). This standard is akin to a summary judgment standard. *See, e.g.,*
18 *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) ("In the context of motions to compel
19 arbitration under the Federal Arbitration Act . . . , the court applies a standard similar to that
20 applicable for a motion for summary judgment."); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d
21 616, 620 (3rd Cir. 2009) (same); *Perry v. NorthCentral Univ., Inc.*, No. CV-10-8229-PCT-PGR,
22 2011 WL 4356499, at *3 (D. Ariz. Sept. 19, 2011) (same). As such, the court may consider matters
23 outside of the pleadings. *Shields v. Frontier Tech., LLC*, No. CV 11-1159-PHX-SRB, 2011 WL
24 13070409, at *4 (D. Ariz. Nov. 30, 2011).

25 **B. The Court Lacks Subject Matter Jurisdiction Over the CCCRAA Claim**

26 The jurisdiction enjoyed by bankruptcy courts is more limited than district courts. *See In re*
27 *Valdez Fisheries Dev. Ass'n, Inc.*, 439 F.3d 545, 549 (9th Cir. 2006). Bankruptcy judges exercise
28 the authority conferred to them under 28 U.S.C. § 157 and 28 U.S.C. § 1334. *In re Resorts Intern.*,

1 *Inc.*, 372 F.3d 154, 161 (3rd Cir. 2004). Specifically, a bankruptcy court may hear and decide “any
2 or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to
3 a case under title 11” pursuant to 28 U.S.C. § 157(a). 28 U.S.C. § 1334(b). “[C]laims that arise
4 under or in Title 11 are deemed to be ‘core’ proceedings, while claims that are related to Title 11
5 are ‘noncore’ proceedings.” *Schultze v. Chandler*, 765 F.3d 945, 948 (9th Cir. 2014); *Maitland v.*
6 *Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1435 (9th Cir.1995).

7 Core proceedings are those that would not exist outside of a bankruptcy, such as “matters
8 concerning the administration of the estate,” “orders to turn over property of the estate,” and
9 “proceedings to determine, avoid, or recover preferences.” *In re Pegasus Gold Corp.*, 394 F.3d
10 1189, 1193 (9th Cir. 2005) (quoting 28 U.S.C. § 157(b)(2)). A nonexhaustive list of core
11 proceedings is set out in 28 U.S.C. § 157.

12 Bankruptcy courts also assert jurisdiction over “a much broader set of cases: those
13 proceedings that are ‘related to’ a bankruptcy case.” *In re Pegasus Gold*, 394 F.3d at 1193. These
14 “non-core proceedings” are those in which the proceeding may not be against the debtor or the
15 debtor’s property, but the outcome could nevertheless “alter the debtor’s rights, liabilities, options,
16 or freedom of action (either positively or negatively) and which in any way impacts upon the
17 handling and administration of the bankrupt estate.” *Id.* (quoting *In re Fietz*, 852 F.2d 455, 457
18 (9th Cir. 1988)). Where bankruptcy proceedings have concluded, a bankruptcy court’s jurisdiction
19 is even more limited. The Ninth Circuit applies the “close nexus” test for post-confirmation “related
20 to” jurisdiction, which asks whether a matter “affect[s] the interpretation, implementation,
21 consummation, execution, or administration of a confirmed plan” or an incorporated litigation trust
22 agreement. *In re Pegasus Gold.*, 394 F.3d at 1193.

23 Here, Plaintiff’s CCCRAA action asserts, in substance, that Navient inaccurately reported
24 the balance of Plaintiff’s student loan debt following receipt of the bankruptcy discharge in
25 violation of the CCCRAA. *See* Complaint ¶¶ 73-97. This cause of action arose, if at all, following
26 the complete administration of Plaintiff’s bankruptcy case and receipt of a bankruptcy discharge. It
27 involves a solely post-discharge dispute between the Plaintiff and Navient. The outcome of this
28 cause of action would have no effect on the bankruptcy estate, which revested in Plaintiff upon his

1 Chapter 7 discharge in 2010. Plaintiff's CCCRAA count fails the "close nexus" test because it does
2 not affect a confirmed plan or any aspect of the bankruptcy proceeding in any way. This Court and
3 other courts in the Ninth Circuit have found that a bankruptcy Court lacks subject matter jurisdiction
4 over such claims. For example, in *In re Hye Rhee Kong*, No. 08-50127-SLJ, 2013 WL 6923063
5 (Bankr. N.D. Cal. Nov. 15, 2013), the court found:

6 Defendant denies that this court has subject matter jurisdiction as to the FDCPA,
7 CCCRA, and FCRA claims, and the court is inclined to agree The claims asserted
8 here involve post-confirmation, post-discharge disputes between Debtor and Defendant.
9 Their outcome would have no effect on the bankruptcy estate . . . More importantly, the
10 allegations appear to fail the "close nexus" test because they do not affect the confirmed
11 plan in any way.

12 2013 WL 6923063, at *3. Similarly, in *Kasim v. Equifax Info. Servs., LLC*, No. CIV.08-627-HA,
13 2008 WL 4858267 (D. Or. Nov. 10, 2008), the court held:

14 Appellant contends that the "close nexus" test should be interpreted as providing
15 jurisdiction if "there is a close nexus between [plaintiff's] discharge and his claims that
16 [defendants] are misreporting his discharged debts However, these issues do not
17 rely on an "interpretation, implementation, consummation, execution, or
18 administration" of a bankruptcy plan. There is no settlement or trust agreement
19 requiring interpretation by the bankruptcy court, and no impact upon the estate itself.
20 The applicable "close nexus" analysis examines the progress of the bankruptcy
21 proceeding itself and not the parties involved in the litigation. That test is not met under
22 these circumstances. The Bankruptcy Court concluded properly that it lacked subject
23 matter jurisdiction and was compelled to dismiss the FCRA claims.

24 2008 WL 4858267 at *3. Indeed, numerous courts across the country have determined that
25 postpetition claims under consumer protection statutes such as the Fair Debt Collection Practices
26 Act, 15 U.S.C. § 1692, *et seq.*, (the "FDCPA"), the Fair Credit Reporting Act ("FCRA"), 15
27 U.S.C. § 1681 and state-law analogues such as the CCCRAA involving post-petition conduct are
28 not within the bankruptcy court's subject matter jurisdiction, even in cases asserting discharge

1 injunction violations. *See In re Csondor*, 309 B.R. 124, 129–30 (Bankr. E.D. Pa. 2004) (“Because
2 the Complaint raises claims grounded in independent Federal and state laws and arising from post-
3 petition conduct, they are not “related” to this bankruptcy for purposes of jurisdiction.”); *In re*
4 *Goldstein*, 201 B.R. 1, 5 (Bankr. D. Me. 1996) (“Goldstein’s F.D.C.P.A. and tort claims are not
5 within this court’s “related to” bankruptcy jurisdiction. . . . The claims hold no potential to impact
6 in any way the “handling and administration of the bankrupt estate.”); *In re Steele*, 258 B.R. 319,
7 322 (Bankr. D. N.H. 2001) (holding that bankruptcy court lacked jurisdiction to rule on FDCPA
8 and state law causes of action for post discharge injunction violation); *McGlynn v. Credit Store,*
9 *Inc.*, 234 B.R. 576, 584 (D. R.I. 1999) (“Even if plaintiffs prevail on their [FDCPA] claim, the
10 recovery would belong to them, not to their respective estates.”); *In re Reyes*, 238 B.R. 507, 508
11 (Bankr. D. R.I. 1999) (holding that bankruptcy court lacked jurisdiction to adjudicate postpetition
12 state law claims); *Buckingham v. Baptist Memorial Hosp.*, 283 B.R. 691, 693 (N.D. Miss. 2002)
13 (holding that FDCPA and RICO claims were not “related to” the estate because they all dealt with
14 post-petition conduct and any recovery would go to the plaintiff and would have no conceivable
15 effect on the estate); *In re Vogt*, 257 B.R. 65, 68 (Bankr. D. Colo. 2000) (holding that bankruptcy
16 court’s limited jurisdiction prevents it from ruling on debtor’s post-discharge FDCPA claim); *In re*
17 *Close*, 2003 WL 22697825 *4 (Bankr. E.D. Pa. 2003) (holding that bankruptcy court lacked subject
18 matter jurisdiction even over UDAP claims arising out of violation of discharge injunction).

19 Accordingly, the Court lacks subject matter jurisdiction over the CCCRAA Claim and the
20 Court should dismiss that claim.

21 **C. The Plain Language of the Promissory Note and the FAA Mandate**
22 **Arbitration for the CCCRAA Claim**

23 Section 2 of the FAA provides, in pertinent part:

24 A written provision in any . . . contract evidencing a transaction involving commerce to
25 settle by arbitration a controversy thereafter arising out of such contract or transaction .
26 . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or
27 in equity for the revocation of any contract.

1 9 U.S.C. § 2. Where the parties have entered into a valid and binding agreement to arbitrate, the
2 FAA further provides, among other things, that the party aggrieved by the failure or refusal of
3 another to arbitrate may move for an order directing that such arbitration proceed in the manner
4 provided for in the agreement to arbitrate. *Id.* at §§ 3, 4.

5 The Supreme Court has, time and time again, confirmed the strong policy favoring
6 arbitration under the FAA. See *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)
7 (“[Section 2 of the FAA] requires courts to enforce agreements to arbitrate according to their
8 terms.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345–46, 352 (2011) (explaining that
9 “the FAA was designed to promote arbitration” and holding that the FAA preempts state law that
10 “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of
11 Congress”) (citation and quotation omitted); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67–
12 73 (2010) (holding that the FAA “places arbitration agreements on an equal footing with other
13 contracts, and requires courts to enforce them according to their terms.”) (citations omitted); *Gilmer*
14 *v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“[Q]uestions of arbitrability must be
15 addressed with a healthy regard for the federal policy favoring arbitration.”) (quoting *Moses H.*
16 *Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The FAA embodies both the
17 “liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter
18 of contract.” *Concepcion*, 563 U.S. at 339 (citations and internal quotation marks omitted).³

19 Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor
20 of arbitration,” *Moses*, 460 U.S. at 24–25, and arbitration “should not be denied unless it may be
21 said with positive assurance that the arbitration clause is not susceptible of an interpretation that
22 covers the asserted dispute.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650
23 (1986) (quotation marks omitted). Put another way, the FAA creates a “presumption in favor of
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26 ³ In resolving whether the parties agreed to arbitrate, “courts generally . . . should
27 apply ordinary state-law principles that govern the formation of contracts.” *First Options of Chi.,*
28 *Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

1 arbitrability; so, parties must clearly express their intent to exclude categories of claims from their
2 arbitration agreement.” *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1320 (11th Cir. 2002).

3 Here, the arbitration agreement expressly states that it is “made pursuant to a transaction
4 involving interstate commerce and shall be governed by the FAA” (Ex. 1 at § S(9)). The
5 Promissory Note states that the parties “agree that either party may elect to arbitrate[—]and require
6 the other party to arbitrate[—]any Claim under the following terms and conditions.” (Ex. 1 at § S).
7 Further, the arbitration agreement in the Promissory Note contains a broad delegation clause which
8 delegates, among other things, issues involving arbitrability, or the enforceability of the Promissory
9 Note as a whole, to the arbitrator.⁴ Plaintiff’s assent to the Promissory Note is more than sufficient
10 to establish a valid and binding agreement to arbitrate.⁵

11 In the Complaint, Plaintiff asserts, *inter alia*, a cause of action relating to the credit reporting
12 of his loan under the CCCRAA. The Promissory Note provides for arbitration of, *inter alia*, any
13 “legal claim, dispute or controversy . . . that arises from or relates in any way to [the Promissory]
14 Note, including . . . disputes involving violation of statute, regulation or common law. (Ex. 1 at §
15 S(4)).

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18 ⁴ Ex. 1 at § (S)(4) (the delegation clause in the Promissory Note is contained in the
19 definition of “Claim” which includes “disputes concerning the validity, enforceability, arbitrability
20 or scope of this . . . this Note,” while the only questions reserved for the court, and not the arbitrator,
21 are disputes about the “validity and effect of the Class Action and Multi-Party Waiver.”).
22 Irrespective of the enforceability of the Promissory Note post-discharge, the arbitration agreement
23 (including the delegation clause) contained in the Promissory Note is severable and separately
24 enforceable. In *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010), the Supreme Court
held that Section 2 of the FAA provides a basis for severing the arbitration agreement from the
rest of a contract even when there is a challenge to the enforceability contract as a whole. Such a
challenge “does not prevent a court from enforcing a specific agreement to arbitrate.” *Id.* at 70;
see also *Belton v. GE Capital Consumer Lending, Inc. (In re Belton)*, No. 15-cv-1934, 2015 WL
6163083, at *3–4, (S.D.N.Y. Oct. 14, 2015) (compelling arbitration of discharge violation claims
and rejecting argument that the discharge rendered the parties’ arbitration agreement
unenforceable).

25 ⁵ Under the FAA, a court presented with a motion to compel arbitration “may
26 consider only issues relating to the making and performance of the agreement to arbitrate.” *Prima
27 Point Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Section 3 of the FAA does
28 not allow for the exercise of discretion by a court and instead mandates that courts “shall direct
the parties to proceed to arbitration” *Countrywide Home Loans, Inc. v. Mortgage Guar. Ins.
Corp.*, 642 F.3d 849, 854 (9th Cir. 2011) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S.
213, 218 (1985)) (granting motion to compel arbitration) (emphasis in original).

1 And the arbitration agreement indisputably extends to Navient as the servicer of the debt.
2 Specifically, in the Promissory Note, the arbitration provision applies to, *inter alia*:

3 [A]ny other subsequent holder of this note; Sallie Mae [now Navient Solutions, LLC];
4 SLM Financial Corporation; all of their parents, wholly or majority owned subsidiaries
5 and affiliates; any predecessors, successors and assigns of these entities . . . [, and] any
6 party named as a co-defendant [in a claim asserted by Plaintiff], such as . . . loan
7 servicers

8 (Ex. 1 at § S(3)).

9 Thus, Plaintiff's claim under the CCCRAA falls within the scope of the arbitration
10 agreement contained in the Promissory Note. Accordingly, the arbitration agreement must be
11 construed and enforced in accordance with the FAA.

12 **D. Even If Subject Matter Jurisdiction Existed, the Bankruptcy Court Should**
13 **Enforce the Arbitration Agreement With Respect to Plaintiff's Claim Under**
14 **the CCCRAA**

15 As set forth above, the Court lacks subject matter jurisdiction over Plaintiff's CCCRAA
16 Claim. Even if such jurisdiction existed, however, the Court should enforce the arbitration
17 agreement in the Promissory Note with respect to such claim. Under Ninth Circuit precedent, a
18 bankruptcy court may exercise its discretion to decline to enforce an otherwise applicable
19 arbitration agreement (a) only with respect to core bankruptcy matters, and (b) only if the arbitration
20 would interfere with fundamental bankruptcy policy. *See In re EPD Inv. Co., LLC*, 821 F.3d 1146,
21 1150 (9th Cir. 2016) (determining that the underlying "causes of action were core proceedings,
22 thereby giving the bankruptcy court discretion to weigh the competing bankruptcy and arbitration
23 interests at stake."); *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012) (noting that
24 "[i]n non-core proceedings, the bankruptcy court generally does not have discretion to deny
25 enforcement of a valid prepetition arbitration agreement" and noting the rationale that "non-core
26 proceedings are unlikely to present a conflict sufficient to override by implication the presumption
27 in favor of arbitration whereas core proceedings implicate more pressing bankruptcy concerns.")
28 (citations omitted); *accord In re Eber*, 687 F.3d 1123, 1131 (9th Cir. 2012) (upholding

1 determination that arbitration in that particular case would “jeopardize a core bankruptcy
2 proceeding”). In other words, in the Ninth Circuit, a bankruptcy court should enforce an applicable
3 arbitration agreement with respect to a non-core proceeding.

4 Numerous courts throughout the country have recognized that causes of action under
5 consumer credit reporting and protection statutes, such as the FDCPA, FCRA and various state-law
6 analogues (such as the CCCRAA) are not “core” bankruptcy matters. *See, e.g., In re Perkins*, 533
7 B.R. 242, 246 (Bankr. W.D. Mich. 2015) (“The relief sought neither arises under the Bankruptcy
8 Code, nor does it arise in a case under the Bankruptcy Code. Rather, the causes of action in this
9 adversary proceeding arise under the FDCPA . . . [a]s such, this adversary proceeding is not a core
10 proceeding.”); *In re Atwood*, 452 B.R. 249, 255 (Bankr. D.N.M. 2011) (“Plaintiff’s claims under
11 the FDCPA, the NM–UPA, and New Mexico common law do not raise substantive rights created
12 under bankruptcy law, can exist independently of a pending bankruptcy case, and are not otherwise
13 defined as core proceedings under 28 U.S.C. § 157(b)(2).”); *In re Nordeen*, 489 B.R. 203, 205 (D.
14 Nev. 2013) (noting that FDCPA claim, among other claims, was non-core matter); *In re Humes*,
15 496 B.R. 557, 567 (Bankr. E.D. Ark. 2013) (finding that FDCPA and equivalent Arkansas state-
16 law causes of action were non-core proceedings); *In re Lee Sinn*, No. 10-43746-CAN13, 2014 WL
17 7689811, at *6 (Bankr. W.D. Mo. Oct. 7, 2014) (“[I]t is undisputed that Count IV [regarding FCRA
18 claims] is not a core matter; . . . FCRA claims neither “arise in” or “under” any provision of
19 title 11”); *Duke v. Trans Union LLC*, No. CIV. 08-520-KI, 2008 WL 4319982, at *2 (D. Or. Sept.
20 16, 2008) (“observing that “there is no question that the FCRA claims do not qualify as a “core”
21 proceeding”); *Kasim v. Equifax Info. Servs., LLC*, No. CIV. 08-628-HA, 2008 WL 4793685, at *2
22 (D. Or. Oct. 28, 2008) (“Appellant acknowledged that his “claims for violating the FCRA are non-
23 core proceedings”); *see also In re Csondor*, 309 B.R. 124, 129 (Bankr. E.D. Pa. 2004):

24 [I]t is clear that neither the FDCPA nor the state law claims ‘arise in’ or ‘arise under’ a
25 particular bankruptcy case. Neither cause of action represents a claim created by the
26 Bankruptcy Code; neither type of claim arises from the administration of the bankruptcy
27 case; and both claims exist independently of bankruptcy cases and are frequently raised
28 in non-bankruptcy fora. Accordingly, these claims do not give rise to core proceedings.

1 Plaintiff's cause of action under the CCCRAA is a state-law cause of action with respect to
2 credit reporting that arose, if at all, after the complete administration of Plaintiffs' bankruptcy case.
3 It is not based on any right expressly created by Title 11 and has an independent existence outside
4 of the bankruptcy. It has no bearing on the restructuring of debtor-creditor relations and does not
5 come within any of the enumerated core proceedings in 28 U.S.C. § 157. Accordingly, Plaintiff's
6 cause of action under the CCCRAA could only be a non-core proceeding, and the Court, if it has
7 jurisdiction at all, should enforce the arbitration agreement with respect to such cause of action.

8 **E. Arbitration of Plaintiff's CCCRAA Claim Does Not Conflict With**
9 **Fundamental Bankruptcy Policy**

10 As set forth above, Plaintiff's CCCRAA Claim is a non-core matter even if subject matter
11 jurisdiction exists. Even if it is not a non-core claim, the Court could only decline to enforce
12 arbitration if "arbitration would conflict with the underlying purposes of the Bankruptcy Code."
13 *Thorpe Insulation*, 671 F.3d at 1021. Arbitration of the CCCRAA Claim does not present such a
14 conflict. Indeed, numerous bankruptcy courts analyzing post-discharge FCRA claims (the federal
15 analogue to the CCCRAA) have found that arbitration of such claims does not conflict with
16 fundamental bankruptcy policies. In *Mann v. Equifax Info. Servs., LLC*, No. 12-CV-14097, 2013
17 WL 3814257, at *9 (E.D. Mich. July 22, 2013), for example, the court held, in pertinent part:

18 The court sees no inherent conflict between the Bankruptcy Code's purposes and
19 enforcing the Arbitration Agreement with respect to Mann's post-discharge FCRA
20 action against NMAC. The Arbitration Agreement is only in play because of Mann's
21 FCRA claim, not because NMAC is attempting to collect a debt that has been
22 discharged. The matter certainly is not a "core" part of Mann's bankruptcy proceedings.
23 Moreover, simply enforcing a provision which defines the venue for resolving their
24 instant dispute does not deprive Mann of the "fresh start" granted by the Bankruptcy
25 Code, because it imposes on her no financial liability whatsoever, and would not
26 undermine any Bankruptcy Code provision.

27 2013 WL 3814257 at *9. *See also Gadomski v. Wells Fargo Bank N.A.*, 281 F. Supp. 3d 1015,
28 1019 (E.D. Cal. 2018) ("Plaintiff's claims [under the FCRA and CCCRAA] relate solely to

1 Defendant's alleged inaccurate reporting of debts . . . and not Defendant's attempts to collect a
2 discharged debt. [T]he Court agrees with the court's reasoning in *Mann* that 'simply enforcing a
3 provision which defines the venue for resolving the instant dispute does not deprive [plaintiff] of
4 [a] 'fresh start' granted by the bankruptcy code.');

5 *Jenkins v. Fifth Third Bank*, No. 1:16-cv-976,
6 2017 WL 3605357, at *5 (S.D. Ohio Aug. 22, 2017) (finding that in light of *Mann*, "referring [the
7 plaintiff's FCRA] claim to arbitration [would] not impose any financial liability on the [p]laintiff,
8 interfere with his 'fresh start' guaranteed by the discharge, nor otherwise conflict with the purposes
9 of the Bankruptcy Code"); *Allen v. Equifax Info. Servs., LLC*, No. 3:17-CV-211-DJH-CHL, 2017
10 WL 5762414, at *4–5 (W.D. Ky. Nov. 28, 2017) ("Allen brings an FCRA claim against Credit One.
11 Submitting this claim to arbitration will not interfere with Allen's "fresh start" or otherwise conflict
12 with the purposes of the Bankruptcy Code.").

12 Here, Plaintiff's bankruptcy case was fully administered over ten years ago. Arbitration of
13 the CCCRAA Claim will have no effect on his bankruptcy estate or any creditors (other than
14 Navient itself), and will not interfere with the "fresh start" given in 2010 through Plaintiff's
15 bankruptcy proceeding. Thus, arbitration of Plaintiffs' CCCRAA Claim does not conflict with the
16 fundamental principles of the Bankruptcy Code.

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1 **IV. CONCLUSION**

2 WHEREFORE, for the reasons stated above, Navient asks the Court to (a) dismiss the
3 CCCRAA Claim from this action for lack of subject matter jurisdiction or, in the alternative,
4 (b) compel Plaintiff to submit the CCCRAA Claim to binding arbitration.

5 Respectfully submitted,

6 /s/ Payam Khodadadi

7 Dated: January 29, 2021

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15 *Counsel for Navient Solutions, LLC
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on January 29, 2021, I electronically transmitted the foregoing
3 document entitled **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN**
4 **SUPPORT OF MOTION TO DISMISS COUNT THREE OF PLAINTIFF'S COMPLAINT**
5 **OR, ALTERNATIVELY, COMPEL ARBITRATION** to the Clerk's Office of the United States
6 Bankruptcy Court, Northern District of California, using the Court's CM/ECF System for filing and
7 service via transmittal of a Notice of Electronic Filing email from the Court to the registered email
8 addresses of the interested parties in this case.

9 I declare under penalty of perjury under the laws of the United States of America that the
10 foregoing is true and correct.

11 Executed on January 29, 2021 at Los Angeles, California.

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13 By: /s/ Payam Khodadadi
14 Payam Khodadadi
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